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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 956

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

vs.

HARNISCHFEGER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

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OPINIONS BELOW

The opinion of the District Court (R. 68) is reported in 54 F. Supp. 326. The opinions of the Circuit Court of Appeals (R. 81-87) are reported in 145 Fed. (2d) 589.

QUESTION PRESENTED

The collective bargaining agreements between the Company and Local No. 1114, United Steelworkers of America (C.I.O.) which have been in force since Octo-

ber 24, 1938 by annual renewals for five years, provided that the "base rate" is the "regular rate" at which each incentive "employee * * * is employed" and that overtime premium of 50 per cent should be paid to "incentive workers on their base rate as heretofore defined." This series of contracts continued the payment of overtime premium which began in 1933 at one and one-half times the base rates (which exceed the statutory minimum) for work exceeding 40 hours per week.

Does continued performance of this contract under the facts in this case constitute a violation of Section 7 of the Fair Labor Standards Act? Section 16 of the Act makes such violation a criminal offense.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C., sec. 201) are as follows:

> "Sec. 7 (a) No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> * * * * *
>
> "Sec. 15 (a) * * * it shall be unlawful for any person—
>
> (1) to * * * sell in commerce * * * any goods in the production of which any employee was employed in violation of section * * * 7 * * *

"Sec. 16 (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

STATEMENT OF FACTS

The evidence is undisputed. It consists of a stipulation of certain facts (R. 7-20) and the testimony of Herman Menck, Vice President of the Company, called as a witness by Petitioner. (R. 23-58) The statement of facts in Petitioner's brief is incomplete and argumentative. Respondent therefore makes a full statement of the pertinent facts herein.

The Company's production employees are classified into two groups, one called "incentive workers" or "piece-workers" and the other called "non-incentive workers" or "day workers." Approximately 1250 or 50% of the production workers are incentive workers. (R. 71) They are the only employees affected by this case.

The present incentive system has been used by the Company since 1927. (R. 7) Under that system, jobs to be performed by incentive workers are given a "job price" determined by an established formula, one factor of which is the estimated time required to do the job as determined either by a "time study" or by experience on comparable jobs. (R. 25, 53, 71-72)

When the worker is employed, whether he is to work as an incentive worker or as a day worker, he is hired (employed) at a definite hourly rate. (R. 27) In the case of non-incentive workers this hourly rate is called

the "day rate." In the case of incentive workers it generally is called the "base rate." However, in factory parlance the terms "day rate" and "base rate" mean the same thing. (R. 36) The various base rates at which the workers are employed are the hiring rates for the various job classifications then current in the Milwaukee district for the experience of the particular employee (R. 27) and (including the "defense wage adjustment" of 5c per hour) range from 55c to $1.05 per hour. (R. 8, 9)

When a specific job is assigned to an incentive worker he receives a card showing the job price (or "piece rate" on the job.) (R. 30) He is paid at his agreed base rate (hourly rate) for the time which he takes to perform the job. If the job price exceeds this figure, he ultimately receives the difference between the two amounts. Such excess of the job price over the hourly earnings, for the sake of uniformity with Petitioner's brief, will be referred to as the "incentive bonus." It is variously called "incentive premium" or "piecework earnings" (R. 30) or "premium earnings." (R. 36, 45)

When the job price is smaller than the hourly earnings for the time worked on the job, the employee nevertheless is paid at his hourly rate for the time worked. This difference in the wages paid between these earnings at base rates and the job price is called "excess labor", which now averages $5,600 per month or $67,200 per annum. (R. 44)

The worker is paid the hourly rate at which he is hired, for the hours worked, regardless of the efficiency or speed at which he works. The incentive system merely gives him the opportunity to receive more in the instances in which, by his efficiency, the job price exceeds the hourly

earnings. The overtime premium at 50 per cent of the hourly rate is paid in addition to any incentive bonus he may receive.

About 98% of all incentive jobs are "partnership jobs." (R. 42) A partnership job is a single job having a single piece price, performed by groups of two or more inventive workers. Such groups working together may consist of (a) one man on the day shift and one on the night shift working on the same job, or (b) groups of men working together on one job on the same shift, or (c) one group on the day shift working with another group on the night shift on the same job. Only about 2% of the incentive jobs are done by single employees working alone. (R. 42)

On partnership jobs the incentive bonus of the entire group is likewise determined by substracting from the job price the aggregate hourly earnings at the respective hourly rates (base rates) of the men in the group and for the varying number of hours which each one worked on the particular partnership job. The excess, if any, of the job price over this aggregate of the hourly earnings is the total incentive bonus of the group. This incentive bonus is then distributed among the individual workers in the "partnership" in the ratio of their individual base rate earnings for the hours they worked on the job to the total base rate earnings of all the men on the job. This is explained in the Record at pages 42-43 and by Example 2 on Exhibit A. (R. 56, 66 at 67)

The work on many piecework jobs extends into more than one pay period (one-half month). As an illustration, the Company has jobs on which the piece price is over $1,000. Such jobs extend over a period of a month or even two months before completion. Other

piecework jobs which may be finished in only one day or a few days, often extend into two pay periods when begun less than that time before the end of a pay period. (R. 44-45)

On any job which extends into more than one pay period the Company cannot determine with any degree of accuracy what proportion of the piecework price (the job) has been completed at the end of a single pay period. (R. 45) The Company cannot determine whether there will be any incentive bonus on the job until it is completed. (R. 45) Hence, at the end of each pay period the workers, pursuant to the contract, are paid at their base or hourly rates for the hours worked during that pay period, with overtime premium of 50% of these hourly rates. At the end of the last pay period in which the job is completed, the job price is checked against the hourly earnings previously paid (exclusive of overtime premium) to determine whether there is any incentive bonus due on the job, and if so, it is paid on the next pay day. (R. 44-45)

Individual workers are not only hired at the hourly rate, but they constantly request increases in their individual rates. Individual employees are constantly being upgraded upon merit. Approximately 300 such increases in the hourly rates have been granted in each pay period. (R. 48, 49)

There is no uniformity among any of the employees either as to whether he receive any incentive bonus in a particular pay period or as to the amount of incentive bonus received in a particular pay period. As stated above with respect to "excess labor", every employee may during an entire pay period (one-half month) produce less work at piecework prices than his earnings at his

hourly rate for such pay period. In such cases he is pai his hourly rate (base rate).

There is no customary percentage of such incentive bonus. In some pay periods it has averaged for the entire plant as low as 5% above the hourly earnings and in others as high as 29%. Referring to such variation, Mr. Menck testified "She can go all over the lot." (R. 57) Sometimes even "the best men in our place * * * don't earn a cent" of incentive bonus. (R. 36)

Although the stipulation of facts states that incentive payroll figures for May, 1943 may be taken to be representative (R. 8), i.e. as including hourly earnings, incentive bonus and overtime premium, the evidence later introduced without objection established that May, 1943 was "an exceptionally good month" during which the Company's shipments were the highest in its history (R. 46), and petitioner's counsel established they were not representative as to ratio between base rates and incentive bonus. (R. 57)

These facts were stated as follows by Circuit Judge Evans in the majority opinion of the Circuit Court of Appeals:

> "An interesting chart has been submitted, which shows the amount of incentive pay which the incentive wage earners have received because of their ability to turn out work faster than the estimated time fixed for the doing of the task. This chart shows the incentive pay varies from 2c to 29c an hour over the basic wage schedule. The amount of the incentive pay of any employee is dependent solely upon his skill and industry. The compensation of an incentive worker may be no more than base rate pay—and but for the contract, might be even less." (R. 82—The chart referred to is at R. 8, 9)

Using averages derived from payrolls, approximately 98½% of all incentive workers on every payroll receive some incentive bonus. The remaining 1½% of the incentive workers receive only their hourly pay.

Section 3(e) of the collective bargaining contract provides:

> "* * * for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee * * *." (R. 11)

Section 4 (a) of the contract provides:

> "The company will operate all shop departments on a basic eight (8) hour day and forty (40) hour week, with time and one-half, computed for incentive workers on their base rate as heretofore defined in Section 3, paragraph (e) * * *." (R. 11)

Pursuant to these contract provisions, the Company paid incentive workers one and one-half times the individual worker's hourly or base rate for hours worked above 40 hours per week in addition to any incentive bonus they might receive. The practice of paying such "time and one-half" for hours worked in excess of 40 hours per week has been continuous since 1933. (R. 41)

The trial court in its Findings of Fact stated:

> "There are a great number of jobs which have not been time studied by the company." (R. 72)

The only witness in the case (called by petitioner) explicitly denied this to be the fact. (R. 53-54) In a speech on March 16, 1942,—three months after Pearl Harbor—he said there were then a great number in the shop. However, as to the situation in general he expressly testified: "It is not a substantial number * * * it is a small number of jobs." (R. 54) This matter is covered in extenso at pages 30-32 of this brief.

The individual base rates of every worker exceeds the minimum hourly rates specified by the statute. (R. 8, 82)

The District Court decided that the Company violated the Act by performing the contract and paying overtime of 50% only on the employees' hourly rates (base rates). The Circuit Court of Appeals reversed this decision. (R. 84-85)

The Court of Appeals held:

> "There would seem to be good reason for providing as the parties agreed, that the regular rate should be the hourly rate (ranging from 58c to $1.08 an hour) rather than said hourly rate plus an unknown and undeterminable addition as incentive compensation. The incentive compensation varied. It was not known. It varied not only in different months but was different with different employees and different products. The addition due to incentive pay was as low as 2c and as high as 29c per hour. The employer and employee evidently wished to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages. They therefore defined regular wage and left therefrom the incentive wage, the determination of which was unknown and unfixed sometimes for weeks and even months.
>
> "There is only one question before us: What was the regular rate of pay? The employer and employees have, as they had a right to do, answered that question for us. They have incorporated their agreement in writing. They acted in good faith. They agreed upon the regular rate of pay, and their regular rate respected the minimum requirement provisions fixed in the statute." (R. 85, 86)

Judge Minton dissented.

ARGUMENT

The "Statement" in Petitioner's brief omits entirely certain facts as to an inherent part of the incentive system under consideration. Petitioner's argument entirely ignores these facts although the conclusion of the Circuit Court of Appeals is based in part upon these omitted facts. (R. 85, 86)

As we read Petitioner's brief, there is no disagreement between us as to the fundamental principle of law involved in this case. We are agreed that even though parties to an employment contract deal at arm's length and in good faith, they cannot enter into a contract, the object of which is to negate the statutory purposes. We readily concede that the parties cannot by contract, establish as the "regular rate" under the statute, a rate which is fictitious and unreal, or which bears no relation to actual wages paid.

A contract which provides for a "fictitious regular rate" or which *arbitrarily* designates a part of the actual earnings as the "regular rate," or one which fixes or computes the "regular rate in a wholly unrealistic and artificial manner," is not effective "to negate the statutory purposes." (*Walling vs. Helmerich & Payne*, 323 U.S. 37, 41, 42)

On the other hand, Petitioner's counsel recognize that the doctrine of *Walling vs. Belo Corp.*, 316 U.S. 624, is that "the employer and employes may establish the regular rate by contract." It must also be conceded in this case as held there that "the contracts were 'actual bona fide contracts of employment' and that 'they were intended to, and did, really fix the regular rates at which each employee was employed.'" (121 F. 2nd 207, 316 U.S. at 629, 630)

The Circuit Court of Appeals, as shown by Judge Evans' opinion (R. 84), applied the philosophy of this court in the Belo case expressed by Justice Byrnes as follows:

> "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. *Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected.* This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not." (316 U.S. at 634, 635) (Italics supplied)

In this case as in the Belo case, the contract arrangement has proven mutually satisfactory to the employer and the employes and has been renewed each year since it was first made shortly after the passage of the Act. The employes are not the complainants.

As held by the Circuit Court of Appeals, there is good reason here for the agreement of the parties that the regular rate should be the hourly rate. This was expressed by Judge Evans as follows:

> "There would seem to be good reason for providing as the parties agreed, that the regular rate should be the hourly rate (ranging from 58c to $1.08 an hour) rather than said hourly rate plus an unknown and underminable addition as incentive compensation. The incentive compensation varied. It was not known. It varied not only in different months but was different with different employees and different products. The addition due to incentive pay was as low as 2c and as high as 29c per hour. The employer and employee evidently wished to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages. They therefore defined regular wage and left therefrom the incentive wage, the determination of which was unknown and unfixed sometimes for weeks and even months." (R. 85, 86)

The administrator here, as in the Belo case, requests the court to ignore the special facts and circumstances of this case under which the parties entered into this contract, and to provide a rigid definition of "regular rate" to mean the rates arrived at by dividing the amount of compensation paid on a *semi-monthly* payroll by the number of hours worked, even though, as stated by Judge Evans, the incentive bonus *if any, for* work in a given week "was unknown and unfixed sometimes for weeks and even months." (R. 86)

In urging this, counsel overlook the fact that Congress used a qualifying word in the statute. It did not merely say "rate" at which he is employed. It qualified that "rate" by the word "regular." Congress thereby recognized that the employment contract or arrangement may

provide for payment of some type of compensation which is separate and distinct from the "regular rate." This is in line with the thought expressed in the Belo case that a rigid definition should not be made because employment relationships "were so various and unpredictable."

Petitioner's request for a rigid definition likewise is contrary to the doctrine expressed in the majority opinion by Mr. Justice Murphy in *Tennessee C.I.&R.Co. vs. Muscoda Local 123,* 321 U.S. 590, at 603, where the court said:

> "This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible. Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubt to to whether certain activity or non-activity constitutes work or employment."

That case involved the question of whether "travel time" in iron ore mines was part of the working hours of the work week.

"REGULAR RATE" IS NOT A RIGID TERM

Petitioner has recently recognized in a policy statement (Release A-13, dated February 5, 1945—2 CCH Labor Law Service Para. 33074—printed in the appendix attached) that "regular rate" does not under all circumstances include all compensation paid *even though due under the contract of employment.* Petitioner there stated that while the "many variations and refinements" of bonuses payable under promise, agreement or arrangement "will be considered a part of the regular rate * * * and must be included in computing his regular hourly

rate of pay and overtime compensation", bonuses payable "at greater intervals than quarterly", need not be included in the computation of the "regular" pay for overtime purposes "even though the bonus would otherwise be of a type requiring such inclusion"' (except where there is obvious attempt to evade the overtime requirements).

In this release the Petitioner stated:

> "The degree of frequency with which a bonus is paid is a factor which the Divisions have always considered in determining whether it should be included in the 'regular' or 'basic' rates of pay for overtime purposes."

The Petitioner stated further that this release was motivated by—

> "* * * Such considerations as the *recognized bookkeeping difficulty confronting employers* in allocating a bonus paid less often than once each quarter to the hours in which the bonus was earned * * * *and the benefit to employees of having a current knowledge* of the hourly rate upon which their overtime will be calculated * * * ." (Italics supplied)

This release is a practical application by Petitioner of the doctrine expressed in the Belo and Tennessee cases that neither the court nor the administrator should provide "a rigid definition of 'regular rate'" since Congress failed to provide one.

As further explained in *Tennessee C.I.&R.Co. vs. Muscoda Local 123,* supra, at p. 603 the Act "does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible". This doctrine is equally applicable here to permit the reasonable provisions of a contract continuing the agreed,

customary and reasonable method of computing overtime premium where precisely accurate computation is either difficult or impossible and which remains unknown and unfixed "sometimes for weeks and even months."

RIGID DEFINITION IMPRACTICAL IN THIS CASE

The wages in this case are paid semi-monthly. On jobs begun in one pay period and ended in another (one or more pay periods later), the incentive bonus earned in any pay period is not determined until after the end of the last pay period in which any of the work is done. The practical difficulty or, in fact, impossibility of accurately determining how much of this incentive bonus was earned in each pay period is immediately apparent. There is no way in which the efficiency and diligency of each of the workers during each of the pay periods can be determined.

Under the system used here each pay day, the incentive workers are paid their wages at their hourly rates, with overtime premium, plus such incentive bonus, if any, as has been earned on jobs begun and finished in that pay period as well as on jobs begun in earlier pay periods but finished in that pay period.

It is therefore impossible accurately to allocate the incentive bonus to the respective pay periods in which earned. *A fortiori,* it is difficult, if not impossible to allocate the incentive bonus to the proper "work week" as the Act requires, because each pay period is one-half month. This means that in every month of the year, the first pay period covers 15 days (1st to 15th inclusive) and the last pay period covers from 13 to 16 days (16th to the last day of the month).

Plaintiff's Exhibit 13 offered by the Petitioner (R. 26, 60) recognizes the difficulty of accurately determining what Petitioner now contends should be the regular rate on which overtime should be computed. This chart is a summary of figures on plaintiff's Exhibits 1 to 12, inclusive, showing for the employes named thereon, their various base rates, total number of hours worked per week, the hourly earnings at base rate, the incentive bonus earned in the several pay periods and the overtime premium paid on the contract basis. Although petitioner had all the facts he could compute only the *"approximate* overtime earned, plaintiff's contention" (last column of Exhibit 13, R. 60).

This claimed statutory overtime apparently had to be "approximate" because overtime hours under the Act must be determined on a weekly basis, whereas all earning figures under the system used are on the basis of semi-monthly pay periods. This figure is approximate in another respect. As pointed out above, it fails to determine what part of the incentive bonus was earned in (a) any specific pay period or (b) in any statutory work week within such pay period. Manifestly, Congress never intended any such approximate process of wage computation to override the employment contract involved here.

All of these difficulties disappear under the contract plan because overtime premium is paid each day for all overtime worked at 50% of the agreed regular rate.

These facts, of course, entered into the conclusion of the Circuit Court of Appeals that "the employer and employee evidently wish to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages" rather than to have the regular rate include "the incentive wage, the determina-

tion of which was unknown and unfixed sometimes for weeks and even months." (R. 86)

While we earnestly contend that under the doctrine of the B lo and the Tennessee cases the intent of the parties as stated in the contracts should be given effect, this case is at least one within the category described by the following language of Mr. Justice Murphy in the Tennessee case just cited:

> "Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubt as to whether certain activity or non-activity constitutes work or employment." (321 U.S. at 603)

To paraphrase the above, the most petitioner can claim about this case is that possibly it is a "borderline case where the other facts give rise to serious doubts" as to whether this incentive bonus constitutes a part of the "regular rate". In such a case, certainly the doubt should be resolved in favor of the long established custom and the intent expressely agreed to in this series of contracts entered into as stated by Judge Evans with "the utmost good faith." (R. 85)

In the light of the special facts in this case, the opinion by Judge Evans stated:

> "If the wage agreement in this case did not settle the regular rate in a bona fide manner through negotiation and did not respect the statutory minimum provisions, we are at loss to know how the parties may cover the subject by agreement.
>
> "Also present is the query—if the parties by inserting a definition of a 'regular rate' in their wage agreement did not intend to fix said 'regular rate' as a basis for the time and a half computation, what was their purpose in inserting it at all?" (R. 85)

CONTRACT WAS EXECUTED IN UTMOST GOOD FAITH

In the lower courts, Petitioner's counsel conceded the good faith of the parties in executing this agreement. The majority opinion of the Circuit Court of Appeals states that this wage agreement was made "in a bona fide manner through negotiation," and said "also there was present the utmost good faith." (R. 85) In their brief in this court, counsel say they do not contend that this provision in the agreements was not included "for the purpose of circumventing Section 7" although they argue they know of no other reason for it. (Brief page 18).

This case, therefore, presents the same problem of interpretation to ascertain the true intent of the parties as was presented in *Overnight Motor Co. vs. Missel,* 316 U.S. 572 and *Walling vs. Belo Corp.* In Missel's case, Mr. Justice Reed said at page 579:

> " * * * we are concerned at this point only with the method of finding the regular rate under the contract with respondent."

Since the contract specified only a weekly salary with variable hours of work, this court held that the regular hourly rate was to be determined by dividing the weekly salary by the variable hours of work each week. However, Mr. Justice Reed stated further at page 581:

> "This contract differs from the one in Walling v. Belo Corp., post, p. 624, where the contract *specified an hourly rate and not less than time and a half for overtime,* with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum." (Italics supplied)

In the Belo case Mr. Justice Reed dissented on the issue as to what the parties had intended to be the regular rate but at pages 636-637 he said:

> "The Court's interpretation that, *in the absence of bad faith,* any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct." (Italics supplied)

The principle of these cases that a written agreement which fixes the "regular rate" is controlling if it is made in good faith and if it actually is a regular rate which is not artificial or wholly unrealistic so as to negate the statutory purpose, was again affirmed by this court in *Walling vs. Helmerich & Payne,* wherein it was stated at p. 41 by Mr. Justice Murphy:

> "The Act clearly contemplates the setting of the regular rate *in a bona fide manner through wage negotiation* between employer and employee, provided that the statutory minimum is respected." (Italics supplied)

No claim was ever made by respondent that the Act does not apply to incentive workers. (*U.S. vs. Rosenwasser,* 323 U.S. 360)

Obviously the first problem is to ascertain the intention of the parties to this contract. Since good faith exists, the best evidence of what the parties considered to be the "regular rate" is their written contract from which the intention to fix the base rate as "the regular rate of pay at which the employee * * * is employed" conclusively appears. (Contract Section 3(e), R. 11)

In the Belo case the contract of employment specified an hourly rate and a guaranteed weekly rate. The Administrator's contention was that these two rates were "inherently inconsistent" and that the intention to fix the

regular hourly rate at 67 cents is overridden by the intention to guarantee the $40 per week." This court rejected that contention.

In this case, the Harnischfeger incentive workers receive their base rates of pay for all hours worked and one and one-half times that rate for all overtime hours, regardless of how much work or how little work they turn out. The incentive plan merely gives them the opportunity to earn an extra incentive bonus uncertain in amount and contingent upon his own and his "partners" efficiency. Petitioner now contends that the clear intention to establish the various individual base rates as the regular rate, is inherently inconsistent with the existence of this incentive system. He contends that since a percentage of the time, varying employes earn varying amounts of incentive bonus, the base rate is "artificial" or, within the doctrine of the case of Helmerich and Payne, is a "fictitious regular rate" or a rate computed "in a wholly unrealistic and artificial manner."

While Petitioner's counsel say they do not contend the contract was made "for the purpose of circumventing Section 7", they state "we know no other reason for labeling them as the 'regular rate for all purposes.'" (Brief page 18) Had counsel fully understood the facts in this case, including the numerous important facts which they omitted from their statement of the case, and ignored in their argument, they would have found the "good reason" for this provision so well stated by Judge Evans. (R. 85, 86).

Petitioner's counsel suggest that because this method of overtime compensation has been employed since 1933, that fact may explain the alleged "failure of the contract to satisfy the overtime requirements of the Act." (Note

on brief page 18). Counsel overlook the fact that this contract has been in force by five annual renewals "since October 24, 1938," (R. 7) the effective date of the Act. The contract of record is dated December 9, 1942. (R. 7) By that date the position of the Petitioner as to the method of computing the regular rate under incentive systems *in the absence of a valid contract to the contrary* was well-known. (See Interpretative Bulletin No. 4, issued November 1938 and revised November 1940.) The Belo case was decided June 8, 1942. This contract therefore was made with full knowledge of the Administrator's position and that decision of this court.

We respectfully submit that the facts in this case demonstrate these contentions of petitioner to be unsound.

THE HOURLY RATE (BASE RATE) IS NOT ARTIFICIAL OR FICTITIOUS

Under the long established practice of the parties continued by this contract, the base rate is actually used on every payroll for computing wages paid.

It is the only certain basis upon which any of the incentive workers can be paid and is the only basis upon which some are ever paid. It certainly is a rate which bears a real relation to actual wages paid.

THE STATUTE REFERS TO THE REGULAR RATE "AT WHICH HE IS EMPLOYED"

Petitioner's counsel present their entire case as if the statute uses the words regular rate *of pay* or regular rate at which he is *paid* rather than regular rate *"at which he is employed."* The fact that Congress used the term rate "at which he is employed" thereby denot-

ing the contract of employment is significant. Petitioner's counsel concede that Section 7(a)

> "* * * contemplates that employes and employers will agree upon the employes' normal compensation by individual or collective negotiations. Provided that the minimum hourly rates established under Section 6 are paid, they are likewise free to fix, and alter as they wish, the method of compensation and the rate at which the employes will be employed during the regular 40-hour work week." (Petitioner's brief, page 15 in *Walling vs. Youngerman—Reynolds Hardwood Company*, No. 955 of this term, which is referred to in the brief in this case)

The opinion by Mr. Justice Jackson in *J. I. Case Company vs. National Labor Relations Board*, 321 U.S. 332, points out that a collective bargaining agreement between the employer and the Union is not the entire contract of employment except in rare cases; that it may be called "a trade agreement rather than * * * a contract of employment" by which "the terms of employment already have been traded out" so that "there is little left to individual agreement except the act of hiring" which may be by writing or by word of mouth or implied from conduct. (321 U.S. 332, at 335) That situation applies to this case.

The collective bargaining agreement here established most of the terms of employment. The actual hiring was accomplished by word of mouth. When the employe is hired at a definite base rate, that is the rate "at which he is employed." It is the hiring rate which is current in the area. (R. 8, 9, 27) It is the rate which he is to receive *all the time* (regularly), without regard to how much or how little he produces. If he is an incentive worker, it is the rate which is used to deter-

mine how incentive bonus, if any, on partnership jobs is to be divided and 98% of all incentive jobs are partnership jobs. (R. 42) It is the only rate which under the system can be paid in full for all hours worked, promptly on each pay day, with the overtime premium paid promptly and at the same time as the payment of the regular wages. (R. 86—Opinion below)

Wages, of course, must be paid every pay day. That is a term of the employment contract implied by custom. It is clear that the employer and the employes, as stated by Judge Evans "wished to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages * * * and left therefrom the incentive wage, the determination of which was unknown and unfixed sometimes for weeks and even months." (R. 86)

THE ACT WAS A PEACETIME STATUTE

The Act in question was approved by the President June 25, 1938. This was still the period of depression. In normal times the Company attempted to hold down overtime hours and required special permission to have men work overtime hours. (R. 46)

Although merchandise produced during overtime hours necessarily has a higher labor cost, this Company made no attempt to keep track of which merchandise was made on overtime hours. (R. 41) This expense was charged to overhead. (R. 46) In normal peacetime operations, overtime work is the exception rather than the rule. This provision first appeared in the contract when overtime was the exception. Overtime has grown enormously during the war. It will be largely reduced when peacetime operations are resumed. The

Act was passed in peacetime and this contract provision was first made in peacetime. *Both are intended primarily to regulate conditions during peacetime.*

In the long run and particularly in peacetime, continuance of high base rates and of satisfactory piecework prices is infinitely more important to the Union and the employes it represents, than a change in the long established method of computing overtime premium because of the war.

It is obvious that if upon Petitioner's theory the method of computing overtime premium is changed, the resulting increased costs would cause pressure upon the Company to bargain collectively for some corresponding reduction in either base rates or piecework prices to offset this increase in labor costs, which is *entirely unintended so far as the contracting parties are concerned.* There is no evidence that either the Union or the employes desire any such change or the resulting pressure on the entire wage structure by reason thereof.

THE PERCENTAGE ARGUMENT IS NOT SOUND

Petitioner's counsel rely largely upon the fact that 98½% of the incentive workers earn some amount of incentive pay, and contend that *ipso facto,* the "regular rate" fixed by contract, is a mere artificial label.

Petitioner's counsel also use 22% or 28% as the so-called average percentage of incentive bonus. Although the figure of 22% appears in Finding VIII (R. 72), as noted above, this statement is based upon figures in the stipulation which as shown by the record, was to be taken as representative only for a limited purpose. As brought

out by Mr. Harding, trial counsel for Petitioner, there is no customary percentage of incentive bonus which fluctuates from a low of 5% to a high in May 1943, the best month in the Company's history, of 29%. (R. 57)

The most that can be said on this point is that based upon averages, approximately 98½% of all incentive workers receive *some* incentive bonus which varies as to the individual worker "all over the lot." (R. 57) On the basis of plant averages, it may average as low as 5% and in May, 1943, the month of highest shipment in history, it went as high as 29%. (R. 57)

The question is therefore correctly stated in this way: Does the fact that under these facts and circumstances 98% of the incentive employes on the average receive some incentive bonus in addition to their earnings at hourly rate, require the conclusion that this contract violates Section 7 by attempting to establish a regular rate which is actually artificial or fictitious, or unreal and bearing no relation to wages actually paid so to to negate the statutory purposes?

We respectfully submit that this conclusion should not and does not follow.

One of the oldest and most common fallacies in logic is that identified by the phrase *"Post hoc ergo propter hoc."* This fallacy is inherent in the argument of plaintiff's cousel who assert that because an employe received $X.00 at the end of a *pay period*, the regular rate at which he was employed in a *work week* must be $X.00 divided by the hours worked in the pay period and then applied, *by estimate or otherwise*, to the particular work weeks within this pay period.

This reasoning is fallacious and contrary to the express agreement and the actual practice. By this over-

simplified approach, counsel ignore the true doctrine of the Belo case and of those cases which have followed it.

The facts here demonstrate that, as intended by the parties and as held by the Circuit Court of Appeals, the incentive bonus is received under special circumstances as something separate and apart from the "regular rate at which he is employed".

Of great importance is—what was the intention of the parties and what did they consider the controlling factor?

There was no showing in the Belo case as to how often employees worked more than 54½ hours and received more than the weekly guarantee. So here, the *number* of incentive employes who receive only the base rate each pay day is not controlling. It is a mere matter of degree. Can the court hold that the clause is arbitrary, or unreal only on the basis of the number who receive monetary benefits from it each pay day? In determining the intention of the parties to a contract renewed over five years, is one to say that because only 1½% of the employes on each pay day receive pay *entirely* under this clause, that the parties did not intend the clear meaning of their words? If so, at what stage in the percentage column will a change take place?

This contract among other things expresses the desire of the employer and the employes to have a definite rate of pay for each employe, not related to his individual or "partnership" volume of production.

Without regard to how many individual employes would have earned less than their base rates but for this contract, the fact is clear that this clause fixing the base rate as the regular rate *operated every pay day*. This is established by the amount of "excess labor" paid

each month and by the constant use of this rate in computing the amount of incentive bonus on the "partnership" jobs.

This court is therefore faced with exactly the same type of interpretation of a contract as was presented in the Belo case,—a choice between an agreed hourly rate as the regular rate and a varying so-called regular rate, to be determined weekly resulting because of a of a contingent and varying semi-monthly incentive bonus. We submit, to paraphrase language in the Belo case that "In this situation, then, it is clearly the *incentive earnings* (guarantee) that become *uncontrolling* (inoperative) and the *base rate* (67 cent hourly rate) fixed by the contract that is controlling." (The added words are in italics. The words from the Belo opinion at page 632, are in parenthesis.)

A rate determined by Petitioner's proposed method would be extremely irregular in the mathematical sense. These parties have been accustomed for years to think and to speak of the base rates as the "regular rate". In the light of the facts in this case, we submit that this provision of the contract is not a sham, is not an artificial label, nor does it provide for fictitious or unreal rates which have no relation to the wages paid.

This conclusion appears clearly from the facts. But even if it be a "borderline" case as suggested in the *Tennessee Coal & Iron case,* the court should hesitate very much to upset a plan which has proven mutually satisfactory year after year and which does not negate the statutory purposes, but instead fulfills the twofold purposes of the Act—(1) to spread employment by placing financial pressure through requiring the payment of overtime premium, and (2) to compensate employes

for the burden of a work week in excess of the hours fixed by the Act.

COLLATERAL ARGUMENTS

While the intention of the parties to fix the base rate as the regular rate appears very clearly from Section 3(e) of the contract (R. 71) and from the other facts herein referred to, there are two other provisions of the contract which are consistent only with this intent.

Section 7 provides that if an employe has been unjustly discharged he shall be reinstated and the company shall "pay full compensation at the employe's regular base rate for the time lost." (R. 17) Thus the parties have expressly agreed that payment at the hourly rate for time lost constitutes "full compensation" to the employe.

Section 4(f) provides that the company must supply each employe with a minimum of four hours' work or four hours' "day rate pay shall be paid, to employees reporting for work unless such employees are notified not to report during the previous day." (R. 14) The terms "day rate" and "base rate" are synonymous. (R. 36) Thus the contract again recognizes that the equivalent of the failure to supply four hours of work under this circumstance is to pay him for four hours *at his hourly rate.*

Petitioner's brief refers to the following sections of the contract which relate to exceptional situations which either arise very seldom or not at all:

1) Section 3(g) (R. 12) provides that "in the interest of maintaining fair piecework rates and encouraging employes to disclose erroneous piecework rates" the com-

pany will not cut or question any established rate "even though the employe is able to turn in as much as twenty (20%) per cent over the standard earning rate. The company, however, reserves the right to question rates where earnings exceed twenty (20%) per cent over standard earning rates." (R. 12) Counsel argue that this makes it plain that employes "are expected to earn substantially more at piece rates than their base rates." (Brief p. 13) This contention was categorically denied by Mr. Menck as follows:

"Q. In other words, a man is expected to make more than his base rate on those jobs?

A. That is not correctly putting it. We don't expect any man to make any piece-work; that is up to him if he wants to. We like to see him make it. Now, if a fellow that is in the habit of earning some piece-work, is a good worker and applies himself, and we ask him to do a day work job, it is only fair that we pay him something over his base rate because we took the ability away from him to earn for two or three hours piece-work jobs because we ask him to do a day work operation.

Q. Well, would it be correct to say that he could be expected to make 20 per cent over his base rate on other jobs?

A. No.

Q. Therefore, you agree to pay him 20 per cent over on a job that is not time studied?

A. No, I can show you the best men in our place that sometimes they don't earn a cent. They are not expected to earn any percentage." (R. 36)

2) Section 3(h) of the contract provides that on any job that should normally be done on piecework where a job price has not been established and cannot be estimated, the job shall be done on day work and the piece-

worker given a premium of not less than twenty (20%) per cent over his hourly base rate. (R. 12). Counsel argue that there are a "great number" of such jobs (Brief, pages 5, 12) and that on such jobs an incentive worker may be paid at least twenty (20%) per cent higher than his base rate "hour after hour and week after week" (Petitioner's Brief, page 19). This is an incorrect statement in two respects:

a) There are only "a small number of (such) jobs" (R. 53, 54), and

b) The pieceworkers are assigned to such jobs only "for two or three hours" at a time. (R. 36)

Petitioner's counsel base their statement on the finding of the trial court that "There are a great number of jobs which have not been time studied by the company." (R. 72, fdg. VII) The record shows that through inadvertence the trial court was inaccurate in this statement. (R. 53-54)

On March 16, 1942, approximately three months after Pearl Harbor, Mr. Menck, Vice-President of the Company, called as a witness by petitioner, made a speech to the employes for the purpose of increasing war production, (Ex. 14, R. 61) following which war production was increased about 10 to 15%. (R. 52) Naturally, due to the new type of orders coming in and pressure for production, the ability to time study the new jobs was restricted. He sought to eliminate any fear on the part of the men that increased production on their jobs would later be used against them and he stated:

> "I also know that there are a great number of jobs in the shop which are marked 'T.S.' and have no rate."

"T.S." means a job to be time studied. (R. 53)

It is most unfair that the situation existing on March 16, 1942, three months after Pearl Harbor, which the court will judicially note was a most exceptional period, should be urged as demonstrating that the incentive plan in force since 1927, with overtime premium paid since 1933 for work over 40 hours per week at one and one-half times the regular rate was fictitious or artificial. In fact, the Administrator's trial counsel sought to have the witness agree that his statement meant there were regularly in the respondent's plant a "great number" of jobs which were not time studied. The witness expressly and explicitly denied this. Since he was the only witness, his undisputed testimony must control over the equivocal and, we submit, erroneous statement in the trial court's findings. That testimony (R. 53, 54) is as follows:

"Q. Are there a great many T.S. jobs that are not rated?

A. Not a great many.

Q. How do you explain the statement in Plaintiff's Exhibit 14 where you say, 'I also know that there are a great number of jobs in the shop which are marked T.S. which have no rate'?

A. That is right.

Q. I thought you said that there weren't a great number of those.

A. It depends on what you call 'a great number.' You didn't ask me to establish any percentage here.

Q. Well, can you give us a percentage, then?

A. I would rather not, because I may be very inaccurate.

Q. What statement is correct, the statement you made previously or the statement you made in that exhibit? There you say there are a great number of jobs.

A. This exhibit is a reprint of a part of a speech. I didn't know that this would be part of a court record at some later trial. I merely wanted to indicate to our men that if there is a T.S. job out there and they don't get a rate on it, it happens, for instance, there is no time study man available, they can't study the job, all right, he will not suffer on it because we didn't have the price on it. That is merely what I wanted to indicate.

Q. And you indicated there were a great number of those jobs?

A. I used the word 'great number.' We have 900 jobs out in the shop, let's say a thousand. That is a great number.

Q. Apparently that is a substantial number or you wouldn't have mentioned it to the men?

A. It is not a substantial number. That is not the fact. It is a small number of jobs.

Q. At any rate, there are a certain number of T.S. jobs which are not rated?

A. There are." (R. 53, 54)

Mr. Menck explained that we bargained for not less than twenty (20%) per cent although "the fellows that bargained for the contract probably would like it to be 100%." (R. 35)

There was no testimony at all that an incentive worker could be assigned to such a non-rated job for as much as a week. The testimony on that point was as follows:

(By Mr. Harding, Petitioner's Trial Counsel)

"Q. Are there times when an incentive worker might perform work on a non-time-studied job or jobs over a period longer than a week?

A. Oh, no; none to my knowledge." (R. 32)

3) The same facts apply to Section 3(i), which provides for a premium of not less than twenty (20%) per cent over hourly base rate where a pieceworker is requested to do day work. This situation seldom happens. (R. 47).

4) Section 3(j) (R. 12) provides that when a pieceworker is required to work on a single piece or small order job "under conditions beyond his control which makes it impossible for him to earn his average high earning rate, an adjustment will be made to yield such rate." Mr. Menck testified that this situation has never happened in his own experience with the company (R. 48) which covered a period of 8½ years. (R. 24)

In addition to the fact that each of these clauses refer to situations which happen seldom or not at all, each of these clauses is subject to Section 3(n) R. 13) which provides for cancellation of all of these premiums by the Company for "any wilful misuse or abuse of day work or rates set." Thus, by the contract it was the base rate *which remained constant under all circumstances.*

5) Petitioner's counsel also refer to Section 13 of the contract (R. 18) by which the Company grants vacations with pay at the "average hourly earnings (exclusive of overtime compensation)." Obviously, the rate of vacation pay is a matter of bargaining. It is not payment of wages for work done. If it were, then since it is due by contract, on Petitioner's theory it would also be a factor in determining the regular rate. Obviously, it is but another example of the type of compensation paid to em-

ployes which is extra and separate from the wages paid based on the regular rate.

The fact that the parties saw fit to provide a special premium for these special occasions which occur so infrequently, is consistent with the fact that the base rate is the regular rate at which the employe is employed.

THE ACT IS A CRIMINAL STATUTE

Although this is a suit in equity, if Respondent's payroll system violates Section 7, the Respondent will have committed an "unlawful" Act under Section 15(a), and under Section 16(a) would be guilty of a crime for wilful violations. While this is a remedial statute, nevertheless the well-established principle of strict construction of criminal statutes applies, and if the statutory language is capable of two constructions, that which relieves the person charged should be adopted.

At an early date Chief Justice Marshall said in *United States vs. Wiltberger,* 5 Wheat. 76, at page 95:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

This proposition was recently reaffirmed and the *Wiltberger* case cited in *Fasulo vs. United States,* 272 U.S. 620, at 628.

Even if the court should consider this a "borderline" case, which we think it is not, we submit that any doubt should be resolved in favor of sustaining the validity of the acts performed.

CONCLUSION

We submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Wage and Hour and Public Contract Divisions Release A-13, February 5, 1945.

A summarization of the position of the Wage and Hour and Public Contracts Divisions with regard to the inclusion of 'bonus' payments in computation of 'regular' or 'basic' rates of pay for overtime purposes under the Fair Labor Standards Act and the Walsh-Healey Act was issued today by L. Metcalf Walling, Administrator of the Wage and Hour and Public Contracts Divisions. This statement was prompted, the Administrator said, by numerous inquiries from employees and employers requesting clarification of the principles followed by the Divisions in applying the overtime requirements of these acts to situations where 'bonus' payments are distributed by employers to employees who work overtime.

Mr. Walling's statement follows:

"Under the Fair Labor Standards Act and the Walsh-Healey Act overtime compensation is payable to employees at rates not less than one and one-half times their 'regular' rates as provided in the Fair Labor Standards Act or 'basic' rates as provided in the Walsh-Healey Public Contracts Act. The 'regular' rate of pay has been defined by the United States Supreme Court in recent decisions as 'the hourly rate actually paid for the normal, nonovertime workweek.' The court has also made it clear that no distinction or discrimination based on the method of employee compensation should be made in applying the provisions of the Fair Labor Standards Act. These decisions support, with respect to both acts, the Divisions' views, as announced in releases R-1548

and R-1548(a) dated September 2, 1941. As stated in these releases, where an employee's 'regular' or 'basic' rate of pay is increased by the payment to him of a 'bonus', additional overtime compensation must be paid for those workweeks in the bonus period when overtime was worked, unless provision is made for the inclusion of such overtime compensation in the 'bonus' payment itself by calculating it on a percentage-of-total-earnings basis.

'Releases R-1548 and R-1548(a) define the type of "bonus" which affects the regular rate of pay and describe how such "bonuses" are to be included in computing the regular rate and the overtime compensation due under the Fair Labor Standards Act. The same rules are applied under the Walsh-Healey Public Contracts Act. These releases, which express the official position of the Divisions with respect to bonus payments, state:

'There are two general categories in which bonus plans fall:

A. In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The sum, if any, is determined by him. The employee has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employees a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid and also sets the amount to be paid.

Bonus payments of this type will not be considered a part of the regular rate at which an employee is em-

ployed, and need not be included in computing his regular hourly rate of pay and overtime compensation.

B. In bonus plans of the second category the employer promises, agrees or arranges to pay a bonus. The amount to be paid may be fixed or may be ascertainable by the application of a formula. An example of this type of plan is a production bonus based on the excess over a minimum quota which the individual, the group, or the plant, produces in a period of time. Closely akin is a bonus which is paid for performing work in less than an established standard time and also a bonus which is paid when certain types of merchandise are sold through an employee's efforts. Other kinds of bonuses falling within this group are bonuses distributed in a certain amount or on the basis of a fixed percentage of the profits of the employer or of his gross or net income. There are many variations and refinements of plans within this category. For example, the amount of the payment may vary according to the length of service of the employee, his production or compensation; the earnings, production or compensation of the group of employees with which he works; the sales or net or gross income of the employer; or it may be contingent upon his continuing in the employ of the employer until the time the payment is to be made.

Bonus payments of this type will be considered a part of the regular rate at which an employee is employed, and must be included in computing his regular hourly rate of pay and overtime compensation.'

Many employers have been troubled by retroactive allocations of a "bonus" where it was distributed less frequently than at the regular pay periods. This difficulty can easily be avoided. No additional overtime

compensation need be computed and paid on a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earning of the individual employees (both straight time and overtime), exclusive of the "bonus". Where the amount paid to each employee is actually based on a percentage of his total earnings, the "bonus" itself includes the payment of both straight time and overtime.

The degree of frequency with which a bonus is paid is a factor which the Divisions have always considered in determining whether it should be included in the "regular" or "basic" rates of pay for overtime purposes. As an enforcement policy to be followed in the absence of authoritative rulings by the courts, the Divisions will in the future not insist on the inclusion of any bonus (except where there is obvious evasion of the overtime requirements) which is paid at greater intervals than quarterly in computations of the "regular" or "basic" rate of pay for overtime purposes, even though the bonus would otherwise be of a type requiring such inclusion. Such considerations as the recognized bookeeping difficulty confronting employers in allocating a bonus paid less often than once each quarter to the hours in which the bonus was earned, the time-consuming burden placed upon the inspection staff when confronted with the task of making such allocations and the benefit to employees of having a current knowledge of the hourly rate upon which their overtime will be calculated motivate this administrative policy.

This enforcement policy, of course, does not and cannot affect the independent right of employees under Section 16(b) of the Fair Labor Standards Act to bring their own suits to recover wages that are due them.